

Legal Issues

Wills



Making a Will

Any person (married or single) over the age of 18 who has mental capacity to understand what they are doing should make a Will.

Making a valid Will is the only way you can be sure that your property is distributed according to your wishes after your death. Where there is any doubt about a person's mental capacity, it is wise to consult the person's doctor.

Executors

Any person over the age of 18 years can be appointed executor of a Will. It is usual to choose family members or friends to be executors of a Will and it is important to choose someone who is thorough and trustworthy.

An executor is responsible for seeing that the terms of the Will are carried out. Being an executor may involve any or all of the following duties:

- Making funeral arrangements
- Disposing of the remains of the testator (person who has made the Will)
- Applying for a certified copy of the death certificate from the Registrar of Births, Deaths and Marriages
- Locating and identifying property belonging to the testator
- Applying for probate (refer fact sheet Estates and Probate).

The executor is also responsible for attending to all financial matters, such as funeral expenses, legal and taxation costs and any other outstanding debts.

Making your intentions clear

It is very important, that the Will is worded in clear, unambiguous language.

Someone experienced in drafting Wills can assist you to make your intentions clear to minimize

the possibility of disputes arising subsequently regarding your wishes.

Preparing a Will

There is no legal requirement that a lawyer must prepare a Will, but it is recommended to employ someone with legal knowledge.

The Public Trustee's Will making service is available only to eligible concession holders or those subject to administration or protection orders issued by the South Australian Civil and Administrative Tribunal (SACAT) or the Courts.

Deferred fees apply. **Tel. 8226 9200,**

1800 673 119 (SA country callers);

www.publictrustee.sa.gov.au/wills-executors-trusts/making-a-will

Private trustee companies prepare Wills for a cost and prefer to be named as executor. All trustee companies charge a commission to administer an estate.

The cost of administering an estate can often be much higher than the cost of making a Will.

Valid Wills

Normally, for a Will to be valid it must be in writing, be signed by the testator in the presence of two witnesses (both present at the same time) and then signed by the witnesses in the presence of the testator.

In South Australia, the testator and witnesses must sign each page at the bottom.

All people **MUST** use the same pen.

It is legal for a Will to be witnessed by a beneficiary or a beneficiary's spouse, but it is preferable to avoid this situation, particularly if there is a possibility that the Will may be contested.

Changing a Will

Anyone whose circumstances have changed – perhaps through marriage, the birth of children, divorce, remarriage or the death of a close

relative, for example – should make a new Will. Married or de-facto couples should make sure both partners make a Will.

Note that jointly-owned assets automatically revert to the surviving co-owner. This is the case with land and property that two or more people own as 'joint tenants'. However when two or more people own assets as 'tenants in common', the person making the Will may leave their share of the property to someone else).

When a Will needs updating, it is best to make a new Will but it can also be updated by adding a codicil to the Will. A codicil is an addition, in a separate document, to an earlier Will.

Anyone considering drawing up their own Will needs to ensure that all formal legal requirements are met.

If this is not done, the Will may be invalid and they may die intestate. It may become costly and time consuming for relatives and other stakeholders if they have to go to court for a decision on the disposal of the assets.

Cancelling or revoking a Will

A testator who wants to replace, or stop the operation of an existing Will should be sure that the existing Will is revoked or cancelled. This can be done in several ways. It is best to make a new Will containing a revocation clause that states clearly that all previous Wills are revoked. An example of a simple revocation clause is: 'I revoke all former testamentary dispositions'.

A later Will may revoke an earlier Will by implication, that is, when the terms of the later Will contradict the terms of the earlier Will. A Will can be revoked by tearing it up or otherwise destroying it, provided it is with the intention of revoking the Will. The testator must do this or the testator can ask someone else to do it. Where a Will has been revoked by means of a legal document revoking the Will, destruction or marriage, a person will die intestate unless a new Will is made.

Marriage and divorce

It is important to note that marriage revokes an existing Will (unless a special "made in contemplation" clause is included). Divorce does not revoke a Will. Divorce only voids gift to a former spouse and the appointment of a former spouse to the position of Executor and or trustee.

Wills made overseas

Generally, a Will made overseas that is valid according to the law of the country where the Will was made, is acceptable in South Australia even if it is not valid according to South Australian law. A Will need not be in English in order to be accepted in South Australia. However, if it is not in English, it must be translated and an affidavit of translation (written statement sworn on oath) must be made, before probate (acceptance by the court of the validity of the Will).

Where to keep a Will

Keep the original, signed copy in a safe place. **DO NOT attach anything to or make any mark on the original Will.**

Photocopies may be made in case the original is lost. A note should be made on the copy of where the Will is kept and the executor(s) informed of its location. Banks and insurance companies hold Wills, usually for a small charge. Trustee companies Will usually only hold a Will if they are named as an executor. Lawyers will usually hold a Will if they have prepared it for a client, even if they are not named as executors.

Assistance with preparing a Will

Legal Services Commission - Telephone service available for preliminary information, advice and referrals.

Tel. 1300 366 424 (Legal Help Line),

<https://lsc.sa.gov.au/>

The Commission's **Law Handbook**

(<https://lawhandbook.sa.gov.au/>) features a

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section on Wills and lists topics that are usually covered within the clauses of a Will.

Law Society of SA - To locate a solicitor in specific areas including Will preparation **tel. 8229 0200** or use the online referral service at www.lawsocietysa.asn.au (under Community > See a lawyer).

Salvation Army - A number of Community Will Days are held each year in different parts of Australia where a simple will can be prepared by a volunteer solicitor. Fees are currently \$100 (per person) or \$150 (for a couple) plus an online booking fee of \$0.50. For appointments go to www.salvationarmy.org.au/donate/wills-and-bequests/community-wills-days/.

Legacy Club of South Australia and Broken Hill - Members (families of Australian Defence Force men and women who have lost their lives or their health as a result of their service) can be referred to solicitors who can provide a will service for a reduced fee. **Tel. 8231 9812; email: reception@legacysa.org.au.**
www.legacy.com.au

The information contained here is general in nature and is not intended as legal advice

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